86-2011

No. .....

Supreme Court, U.S.
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JUN 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CLARENCE J. WILSON, ET AL.,

Petitioners,

v.

ARMSTRONG WORLD INDUSTRIES, INC. ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS ARMSTRONG WORLD INDUSTRIES, INC., EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, OWENS-ILLINOIS, INC., AND OWENS-CORNING FIBERGLAS CORPORATION

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QUESTIONS PRESENTED

1. Did the trial court abuse its discretion by not dismissing a venireman for alleged bias where Petitioners did not challenge the venireman in the trial court on the basis of bias?

2. Did Petitioners waive any challenge for cause of the venireman based on the allegation of bias and can Petitioners demonstrate prejudice where:

   A. Petitioners did not challenge the venireman for bias in the trial court;

   B. The allegedly biased venireman was peremptorily stricken from the jury by Petitioners;

   C. Petitioners did not suggest to the trial court that they had any objection to nor that they would have peremptorily challenged any of the veniremen who were selected as jurors; and

   D. The Petitioners complain about a 12-0 verdict, and the parties had stipulated that a 10-2 verdict would be binding?

LIST OF PARTIES

PLAINTIFFS:

Robert C. Belinge
Vernon W. Botter
Lloyd B. Brannen
B. C. Brown
John W. Campbell
Russell F. Cash
Leslie B. Childers
Robert R. Childers
Edwin E. Cimerhanzel
John W. Copeland
Ralph Daigle
Gilbert P. Davis
Tommie L. Easley
Billy Green
Edward F. Grein
Johnny Louis Grein
Leo V. Grein
Marvin G. Grein
Wilford B. Grimes
James C. Harrison
Ernest L. Hartwell
William H. Howard
William C. Jones
Charles O. Kramer
Michael S. Massey
William J. Massey
Carl J. Moeller
Tommy L. Murphree
Luke Naquin
Louis E. Oldham
C. Oliver
Leemon R. Pennington
Joel Ross
Ralph Ross
Wilson E. Rudy
Alton B. Sanford
Jesse A. Shrader
William C. Stanley
Jeff Steed
David Strebeck
William C. Taylor
Harvey Lee Thompson
Johnnie C. Todd
Victor E. Turner
Murray E. Wilkening
Vernon T. Williams
Clarence J. Wilson
Frank J. Wishard
Augustin O. Zarate

DEFENDANTS:*

Armstrong World Industries, Inc.
Celotex Corporation
Eagle-Picher Industries, Inc.
Fibreboard Corporation
Owens-Corning Fiberglas Corporation
Owens-Illinois, Inc.
Pittsburgh Corning Corp.
Raymark Industries, Inc.
Standard Insulations, Inc.

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* A listing of all parent companies, subsidiaries and affiliates of the defendants filing this brief appears as Appendix B to this brief in compliance with Sup. Ct. R. 28.1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	v
JURISDICTION	vi
STATUTES AND RULES INVOLVED	vii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Cases	
Alexander v. *United States*, 138 U.S. 353 (1891)	5
Dobbert v. *Florida*, 432 U.S. 282 (1977)	4
Hallett v. *Houston Northwest Medical Center*, 689 S.W.2d 888 (Tex. 1985)	7
Goldstein v. *Kelleher*, 728 F.2d 32 (1st Cir.) *cert. denied* 469 U.S. 852 (1984)	7
Lewis v. *United States*, 146 U.S. 370 (1892)	6
Lusich v. *Bloomfield Steamship*, 355 F.2d 770 (5th Cir. 1966)	5
Neu v. *Grant*, 548 F.2d 281 (10th Cir. 1977)	5
Reynolds v. *United States*, 98 U.S. 244 (1878)	3
Signal Mountain Portland Cement Co. v. *Brown*, 141 F.2d 471 (6th Cir. 1944)	7
Stroud v. *United States*, 251 U.S. 15 (1919)	6
United States v. *Brown*, 644 F.2d 101 (2d Cir.), *cert. denied*, 450 U.S. 969 (1981)	3
United States v. *Horton*, 646 F.2d 181 (5th Cir. 1981)	3
United States v. *Salinas*, 654 F.2d 319 (5th Cir. 1981)	3
Statutes	
28 U.S.C. § 1866	5
28 U.S.C. § 1870	vii
Rules	
Fed. R. Civ. P. 46	3, 5
Fed. R. Civ. P. 47(a)	3
Fed. R. Civ. P. 48	7
Treatises	
47 Am. Jur. 2d *Jury* § 216 at 804 (1969)	3
47 Am. Jur. 2d *Jury* § 221 at 812 (1969)	3

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated February 26, 1987, is reported at 810 F.2d 1358 and is reprinted as Appendix A. The District Court's opinion on unrelated issues is reported at 107 F.R.D. 250.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254. The date of the Fifth Circuit judgment is February 26, 1987, and the Petitioner's Motion for Rehearing was overruled on March 26, 1987.

STATUTES AND RULES INVOLVED

28 U.S.C. § 1866 provides in part:

> [N]o person . . . shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be . . . (2) excluded by the court on the ground that such person may be unable to render impartial jury service . . . or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown . . . .

28 U.S.C. § 1870 provides in part:

> In civil cases, each party shall be entitled to three peremptory challenges.
>
> . . . .
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

Fed. R. Civ. P. 46 provides in part:

> [I]t is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor . . . .

Fed. R. Civ. P. 47(a) provides:

> *Examination of Jurors.* The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

Fed. R. Civ. P. 48 provides:

> The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS ARMSTRONG WORLD INDUSTRIES, INC., EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, OWENS-ILLINOIS, INC., AND OWENS-CORNING FIBERGLAS CORPORATION

STATEMENT OF THE CASE

This is a products liability suit involving fifty plaintiffs (Petitioners) who claim that they suffered personal injury as the result of inhaling asbestos dust released by insulation products manufactured by defendants (Respondents).

The trial court, Honorable Hugh Gibson presiding, bifurcated the trial so that the issues of liability and punitive damages would be tried first and then, if necessary, compensatory damages would be determined in a subsequent trial. After a three-week trial, the jury returned a verdict finding that defendants had a duty to warn

of the potential dangers of their products beginning on August 1, 1966. The effect of the jury's answer was to exonerate six defendants and to find potential liability on the issue of product defect against three defendants. The jury found in favor of all the defendants on the issue of gross negligence.

During jury selection, the trial court conducted some voir dire examination and then permitted the attorneys for both sides to conduct further, more detailed examination. The venireman that plaintiffs now complain was biased, Dr. Wang, was questioned by the court and attorneys for plaintiffs.

At no time during jury selection did the plaintiffs challenge Juror Wang for bias. The only challenge made of Juror Wang was based on the unsubstantiated allegation that his employer, Dow Chemical Company, is involved in similar litigation. The trial court overruled plaintiffs' challenge.

In the Fifth Circuit Court of Appeals, plaintiffs argued that the trial court abused its discretion in not dismissing Juror Wang because of his alleged bias. The Fifth Circuit concluded that there was "no question that the district court correctly denied the challenge for cause on the basis of Dr. Wang's employment with Dow Chemical" and, in addressing the claim of bias, held that "since counsel for appellants neither pursued the matter nor mentioned it in their challenge for cause, we do not find an abuse of discretion requiring a new trial." 810 F.2d 1358, 1361.

REASONS FOR DENYING THE WRIT

A. The Trial Court Properly Exercised Its Discretion In Not Excusing Juror Wang Because Of Alleged Bias.

Whether a potential juror should be dismissed for cause rests within the sound discretion of the trial court, and the decision of the trial court is not grounds for reversal absent a showing of abuse of discretion or manifest prejudice. *United States* v.

Salinas, 654 F.2d 319, 328 (5th Cir. 1981); *United States* v. *Horton*, 646 F.2d 181 (5th Cir. 1981); *United States* v. *Brown*, 644 F.2d 101 (2d Cir. 1981), *cert. denied*, 450 U.S. 969 (1981). The trial court has this discretion because of its ability not only to hear the testimony of the potential juror but to see the juror and judge his manner and demeanor. *Reynolds* v. *United States*, 98 U.S. 244 (1878); *see also*, 47 Am. Jur. 2d *Jury* § 221 at 812 (1969).

If a litigant desires to challenge a venireman for cause, he must, in a timely manner, set forth clearly and distinctly the grounds for the challenge. Fed. R. Civ. P. 46. A simple challenge "for cause" is insufficient. 47 Am. Jur. 2d *Jury* § 216 at 804 (1969). In this case, Judge Gibson questioned the jury panel about any connection with, interest in, or knowledge of the defendants or their products (Transcript p. 7). Dr. Wang, venireman number six, responded to the court's inquiry. The discussion between Judge Gibson and Wang revealed that he had never worked with or studied asbestos, but he had read several articles on the subject (Transcript p. 12). A sidebar discussion with Judge Gibson was held, during which time Judge Gibson had ample opportunity to assess the responses of Wang and to study his demeanor and candidness. At that time, plaintiffs' attorney did not challenge Dr. Wang for cause, and Wang returned to his seat with the remaining panel.

The court allowed the attorneys to conduct more detailed examination pursuant to Fed. R. Civ. P. 47(a). Counsel for plaintiffs asked the jury panel if they could render an impartial verdict based on the evidence and the instructions from the court. (Transcript p. 34 - follow law), (p. 34 -compensate injured party), (pp. 35-6 - accept documentary evidence about hazards of asbestos in 30's and 40's), and (p. 37 - ability to award punitive damages). Dr. Wang gave no indication in response to these questions that he would not be fair and impartial.

During further voir dire of the jury, plaintiffs' counsel personally questioned Wang concerning his employment and knowledge of asbestos (Ballard at 42-44). Again, plaintiffs' counsel did not challenge Dr. Wang for cause.

After the voir dire examination, the following exchange took place between the court and the attorneys:

> Mr. Ballard: Your Honor, along that line, could we challenge Dr. Wang? He's the chemist that works for Dow and is very involved in asbestos litigation before this very Court.
>
> The Court: Has he been involved before this Court?
>
> Mr. Ballard: He hasn't, but his employer has, and he's in the chemistry department.
>
> The Court: Is there any objection to the challenging?
>
> Mr. Stamm: We object.
>
> The Court: I do not see a basis for challenging for cause.

(Transcript pp. 68-69)

There was no further discussion about Dr. Wang, and plaintiffs' counsel never again challenged or attempted to set forth any other basis for challenging Dr. Wang.

The discussion among Judge Gibson, Dr. Wang, and the attorneys at most may have evidenced a prior knowledge, or familiarity to some degree by Wang, of some of the general fact issues which might be presented at trial. However, jurors need not be totally ignorant of the facts or issues involved in the litigation in order to be qualified. *Dobbert* v. *Florida*, 432 U.S. 282 (1977). Judge Gibson, having the opportunity to assess Wang's demeanor during the exchange, and in the absence of any challenge for cause at that time, allowed Wang to return to the panel.

Plaintiffs never asked the court to disqualify Dr. Wang because of alleged bias. When plaintiffs finally did move to strike Wang,

the challenge was based solely on plaintiffs' unsubstantiated assertion that Wang's employer was involved in asbestos litigation (Transcript p. 69). Not only was that statement unsubstantiated, it was insufficient as a matter of law to disqualify Wang for cause. *Lusich* v. *Bloomfield Steamship*, 355 F.2d 770, 775 (5th Cir. 1966) (involvement in previous litigation by a prospective juror's employer was not grounds to sustain a challenge for cause); 28 U.S.C. § 1866. Plaintiffs did not even attempt to prove or suggest that Wang himself had any knowledge that his employer was allegedly involved in asbestos litigation. After Judge Gibson said that he found no basis for excluding Dr. Wang on the basis of his employment, plaintiffs never again raised a challenge nor articulated any other ground for challenge.

B. PLAINTIFFS WAIVED ANY CLAIM THAT VENIREMAN WANG SHOULD HAVE BEEN DISMISSED FOR BIAS, AND PLAINTIFFS CANNOT SHOW PREJUDICE.

Fed. R. Civ. P. 46 requires that an objecting or moving party state grounds for his objection or request for action to the court with reasonable particularity.

> The purpose for timely objection or motion as a precedent to review on appeal is two-fold. It provides the trial court with the opportunity to know the *specific* contentions and to take corrective action, if required. And — more importantly for appellant review — *it does not* permit a party to sit idly by, watching error being committed, and then take a "first" shot at the claimed error without having accorded the trial court the opportunity to correct its action. Such is not allowed.

Neu v. *Grant*, 548 F.2d 281, 287 (10th Cir. 1977) (citations omitted). This principle applies to all segments of the trial. *Id.*; *see also Alexander* v. *United States*, 138 U.S. 353, 355 (1891).

As noted, plaintiffs never requested the trial court to disqualify Dr. Wang because of alleged bias — the sole basis for their petition to this court. Instead, plaintiffs based their challenge for

cause in the trial court solely on the fact that Dr. Wang worked for Dow Chemical, allegedly a party in some asbestos suits. Plaintiffs do not now complain of the trial court's overruling that challenge, but complain that the court did not on its own strike Wang for bias. The allegation of bias, not having been raised in the trial court, was waived.

Plaintiffs also contend for the first time on appeal that the court's failure to strike Dr. Wang for cause was prejudicial because it forced plaintiffs to use a peremptory challenge on Dr. Wang rather than on Juror Leverton, who subsequently was chosen foreman by the jury. Plaintiffs' counsel questioned Juror Leverton at length (Transcript pp. 31-32; 49), but he never challenged Leverton for cause nor did he express any concern about Leverton's presence on the jury panel.

Plaintiffs should not be permitted to raise the claim that Juror Leverton was unacceptable for the first time on appeal. At no time was Judge Gibson informed of plaintiffs' alleged dissatisfaction with Juror Leverton. Previous opinions of this Court, in dicta, indicate that such displeasure must be made known to the trial court in order to preserve any alleged error in the selection of the jury. In *Lewis* v. *United States*, 146 U.S. 370 (1892) the Court listed several facts which, if present in the record, would have allowed the court to determine if the defendant's rights had been prejudiced by the government and the defendant striking several of the same jurors. Leading the list is that the record did not reflect that defendants made any effort to challenge jurors beyond the number allowed by the court and statute. *Id.* at 379. In *Stroud* v. *United States*, 251 U.S. 15, 21 (1919), a case in which a challenge for cause was denied and the juror was stricken peremptorily, this Court stated, "since there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable, we are unable to discover anything which requires a reversal upon this ground." The proper method of preserving error when a litigant has exhausted his peremptory strikes and,

therefore, must accept an objectionable juror, is to make it known to the trial judge before the venireman is seated that the venireman is objectionable and would be stricken if possible. *See Signal Mountain Portland Cement Co.* v. *Brown,* 141 F.2d 471, 477 (6th Cir. 1944). *See also Goldstein* v. *Kelleher,* 728 F.2d. 32, 38 (1st Cir.), *cert. denied* 469 U.S. 852 (1984).

The reasoning of the Texas Supreme Court's opinion in *Hallett* v. *Houston Northwest Medical Center,* 689 S.W.2d 888 (Tex. 1985), although not binding on this Court, is persuasive. In *Hallett,* the Texas Supreme Court held that to preserve error for failure to excuse a juror for cause, the complaining party must (1) use all peremptory challenges allotted and (2) advise the trial court that notwithstanding the use of the peremptory challenges, specific objectionable jurors would remain. Failure to establish such a predicate by the complaining party waived any error. *Id.* at 890.

The *Hallet* opinion recognizes that not requiring a litigant to advise the trial judge that he was being forced to take an unacceptable juror would encourage litigants to adopt a "wait and see" attitude about a juror's view of the facts. The only method of preventing this strategy is to require litigants to express their objections to a particular juror in the trial court. Judging a prospective juror's attitudes and deciding which jurors to strike is filled with uncertainty. The uncertainty is not completely resolved until the verdict is returned, and litigants should not be permitted to express their dissatisfactions with a juror for the first time after the jury has made its decision.

The plaintiffs did not properly object to nor specifically challenge Dr. Wang for cause except for the challenge based on the fact that Wang was employed by Dow Chemical Company. No abuse of discretion was committed by Judge Gibson in refusing to strike Dr. Wang on the only ground raised in the trial court. Further, no statement of any kind was made to show that plaintiffs in any manner were dissatisfied with Dr. Leverton. Even

assuming that Dr. Wang should have been dismissed for cause, plaintiffs cannot show that they were harmed because Wang did not become a member of the jury, and the plaintiffs did not complain about Juror Leverton until after the verdict was returned. A lack of harm is also conclusively established by the 12-0 verdict and the parties' agreement pursuant to Fed. R. Civ. P. 48 to accept a 10-2 verdict. Even if Dr. Wang had been dismissed for cause and Leverton stricken peremptorily, the verdict of which plaintiffs complain could have been at best 11-1 instead of 12-0.

CONCLUSION

The trial court correctly overruled plaintiffs' only challenge for cause of venireman Wang, and plaintiffs failed to make or preserve their challenge of Wang based on grounds raised for the first time on appeal. Nor can plaintiffs show how they have been harmed by the alleged error.

Far from involving substantial questions that warrant this Court's discretionary review, the alleged error complained of was not raised in the trial court and would have involved a discretionary ruling if it had been properly raised in the trial court. For these reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

CLARENCE J. WILSON, et al.,
Plaintiffs-Appellants,

v.

JOHNS-MANVILLE SALES CORP., et al.,
Defendants-Appellees.

No. 85-2727.

United States Court of Appeals,
Fifth Circuit

Feb. 26, 1987.

Rehearing and Rehearing En Banc
Denied March 26, 1987.

Products liability action was brought against manufacturers of products containing asbestos. The United States District Court for the Southern District of Texas, Hugh Gibson, J., entered judgment on jury verdict for certain defendants, and plaintiffs appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) refusal to sustain plaintiffs' challenge for cause to one of the veniremen was not abuse of discretion; (2) defendants' opening argument was not sufficiently prejudicial to deny plaintiffs fair trial; and (3) exclusion of plaintiffs' expert witness' testimony was appropriate sanction for witness' deliberate refusal to comply with discovery order.

Affirmed.

See also, D.C., 197 F.R.D. 250.

1. Jury (key)130

Denial of products liability plaintiffs' challenge for cause to venireman, in action against producers of asbestos-related prod-

ucts, was not abuse of discretion, though venireman was in same business as one of the defendants, where plaintiffs did not refer to question of venireman's personal bias in challenge for cause.

2. Federal Courts (key) 905

Products liability defendants' comments during opening argument, referring to plaintiffs' assertions as "pure nonsense" and to plaintiffs' "real motivation" as "simple greed," were not so prejudicial as to effectively deny plaintiffs fair trial where trial lasted three weeks and court instructed jury that opening statement assertions were not evidence.

3. Federal Civil Procedure (key) 1278

Exclusion of plaintiffs' expert witness' testimony, in products liability action, was not abuse of discretion, where expert deliberately refused to produce certain discovery material which court deemed relevant to defendants' case, absent evidence that expert was only expert who could testify in support of plaintiffs.

Grant Kaiser, Robert E. Ballard, Houston, Tex., for plaintiffs-appellants.

Michael B. Schwartz, Butler, Binion, Rice, Cook & Knapp, Elizabeth Thompson, Houston, Tex., for Raymark Industries, Inc.

Richard L. Josephson, Baker & Botts, Arthur Stamm, Houston, Tex., for Armstrong World Industries, Eagle-Picher, Owens-Illinois, Inc. and Owens-Corning Fiberglas.

Weller, Wheelus & Green, David L. Tolin, Beaumont, Tex., for Fibreboard Corp.

Mehaffey, Weber, Keith & Gonsoulin, Gene M. Williams, Sandra F. Clark, Beaumont, Tex., for Standard Insulations, Inc.

Hallmark & Boswell, John H. Boswell, Houston, Tex., for Armstrong World Industries.

Gray & Keene, Richard C. Keene, San Antonio, Tex., for Forth-Eight Insulations, Inc.

Beckenstein, Norvell & Bernsen, Gail C. Jenkins, Beaumont, Tex., for Celotex Corp.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal is from a jury verdict favoring appellees, manufacturers of asbestos products, in a consolidated products liability action involving fifty claimants. Appellants, the claimants, challenge three discretionary rulings of the district court and ask that the case be reversed and remanded for a new trial. They claim that the district court erred in failing to sustain their challenge for cause to one of the prospective jurors, in allowing appellees to make improper and prejudicial comments during opening statement, and in excluding the testimony of one of their expert witnesses. Because we find that the district court did not abuse its discretion, we affirm the judgment.

I. *Facts*

Appellants comprise a group of fifty insulators, pipe fitters, and electricians allegedly suffering from asbestos-related injuries and illnesses. Appellees are or were manufacturers of asbestos-containing insulation products. Each appellant individually had brought suit against the manufacturers in the Galveston Division of the United States District Court for the Southern District of Texas. Their causes of action were consolidated by order of the district court on February 21, 1985.

The district court ordered separate trials on the issues of liability and damages pursuant to Fed.R.Civ.P. 42(a). There first was to be a single trial to determine whether the manufacturers generally were liable to the claimants and whether punitive damages should be assessed. If the claimants prevailed on the issue of the manufacturers' liability, the court then would order separate trials to determine each individual's damages.

In the trial of the common issue of general liability, the jury found that while most of the products contained asbestos and were capable of producing sufficient dust to cause bodily injury, only Celotex Corp., Pittsburgh-Corning Corp., and Ray-Mark Industries, Inc. could be liable to appellants because they failed to warn adequately of the dangers of their asbestos-containing products. The jury also determined that none of the manufacturers had acted carelessly or recklessly. No punitive damages were assessed. The district court decided that there was no just reason for delay and entered a final judgment in favor of Armstrong World Industries, Eagle-Picher Industries, Inc., Fibreboard Corp., Owens-Corning Fiberglass Corp., Owens-Illinois, Inc., and Standard Insulations, Inc. Appellants then filed a timely notice of appeal from the take-nothing judgment involving the six appellees. The three remaining appellees did not seek an interlocutory appeal in this action, and their cases are still pending before the district court.

II. *The Challenge For Cause*

[1] Appellants request us to reverse the decision below and remand for a new trial becauxe the district court erred in refusing to sustain their challenge for cause to one of the veniremen, Dr. Wang. They contend that Dr. Wang's responses to questions posed by the district court clearly indicated the existence of actual prejudice and that, once bias was established, they automatically were entitled to have the district court excuse Dr. Wang. By denying their challenge for cause, the district court forced appel-

lants to use one of their peremptory challenges to strike Dr. Wang from the jury panel. Appellants also claim that as a result of the necessity to use a peremptory challenge when grounds for a challenge for cause had been established, they were unable to remove another objectionable juror, John B. Leverton, from the panel. Thus, they assert prejudice by the error of the district court. We do not find appellants allegations to be justified.

At the commencement of voir dire, the district court asked all of the prospective jurors, "Do have [sic] you have any connection at all, have any particular interest in or know anything particularly about any of these corporations, each of which at one time, if not now, was in the business of manufacturing and marketing asbestos products?" Dr. Wang informed the court that he was a research chemist with Dow Chemical and that, while he had never worked with asbestos, he had read about it. He stated that "the carcinogenicity [of asbestos] was not known until several years ago."

Dr. Wang's comments indicated the existence of some potential area of bias on his part. Once the possibility of actual prejudice has emerged, appellants argue that "the court has the duty to develop the facts fully enough so that it can make an informed judgment on the question of 'actual' bias." *United States* v. *Nell,* 526 F.2d 1223, 1229 (5th Cir.1976). We find no error in the district court's exercise of discretion in carrying out this duty.

After Dr. Wang made known his familiarity with asbestos, the district court immediately asked him to approach the bench. In the presence of counsel, the court conferred with him about his ability to return a verdict based solely on the evidence.[1] While

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[1] While at the bench, the following conversation took place:

THE COURT: You are a chemist and you have read about asbestos?

JUROR WANG: Yes.

Dr. Wang indicated that it would be difficult for him to be impartial, we cannot say that this evidence of bias is automatically disqualifying. The court apparently was satisfied by Dr. Wang's response and demeanor, and appellants made no objection.

After the court finished its own examination of the veniremen, all of the parties were allowed to examine the prospective jurors in order to explore fully any problems which they may have perceived. Appellants used this opportunity to question Dr. Wang extensively about the nature and scope of his employment at Dow Chemical, a company which they claimed was deeply involved in asbestos litigation. This concern served as the sole basis of appellants' challenge for cause to Dr. Wang.[2] The issue of actual

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THE COURT: And what is it that you read about it that you wish now to report?

JUROR WANG: Well, it's a carcinogenic, asbestos is known, for maybe about three or four years ago, maybe.

THE COURT: Okay.

JUROR WANG: And I'm making a new chemical which is usually not known as a carcinogenic or whatnot. You're making a compound and you don't —

THE COURT: Just a second. I want the best answer you can give me to this: Could you sit as a juror and listen to the evidence, and there's going to be evidence with regard to the characteristics of asbestos and what was known about asbestos at a given time in the past, and accept that testimony after you have weighed it for credibility, and come to a verdict based only on the evidence that you hear developed during the course of this trial; can you do that?

JUROR WANG: I'm afraid that I'm a little bit partial.

THE COURT: All right. You would — you would import into your thinking things that you knew regardless of what might be said upon the stand?

JUROR WANG: Yes, sir.

THE COURT: All right. Thank you.

[2] The following exchange took place at the close of voir dire:

MR. BALLARD: Your Honor, along that line, could we challenge Dr. Wang? He's the chemist that works for Dow and is very involved in asbestos litigation before this very Court?

or potential personal bias on the part of Dr. Wang was never raised by appellants until this appeal.

Since the district court is in the best position to observe the juror and to make a first-hand evaluation of his ability to be fair, it is given broad discretion in determining a juror's impartiality. *United States* v. *Salinas*, 654 F.2d 319, 328 (5th Cir.1981). "The determination as to the impartiality of a juror ... will not be reversed absent an abuse of [the court's] discretion." *United States* v. *Apodaca*, 666 F.2d 89, 94 (5th Cir.1982). *See also United States* v. *Brown*, 664 F.2d 101, 104 (2d Cir.1981) ("In order for a trial judge's determination of a juror's impartiality to be set aside, there must be shown 'manifest' prejudice.").

We find nothing in this case requiring us to reverse the decision of the district court. There is no question that the district court correctly denied the challenge for cause on the basis of Dr. Wang's employment with Dow Chemical. *See Lusich* v. *Bloomfield Steamship Co.*, 355 F.2d 770, 775 (5th Cir.1966) ("The mere fact alone that a member of the jury panel is in the same business as that of one of the litigants ... does not make him subject to challenge for cause."). The question of Dr. Wang's bias is somewhat ambiguous, and since counsel for appellants neither pursued the matter nor mentioned it in their challenge for cause, we do not find an abuse of discretion requiring a new trial.

Hopkins v. *County of Laramie, Wyoming*, 730 F.2d 603, 605 (10th Cir.1984) is closely analogous. It involved a civil rights action under 42 U.S.C. § 1983. At the conclusion of the voir dire, plaintiffs challenged three jurors for cause. The court denied the

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THE COURT: Has he been involved before this Court?

MR. BALLARD: He hasn't, but his employer has, and he's in the chemistry department.

THE COURT: Is there any objection to the challenging?

MR. STAMM: We object.

THE COURT: I do not see a basis for challenging for cause.

challenges, but asked plaintiffs if they had any further questions. They did not, and plaintiffs then exercised three peremptory challenges to excuse the jurors. On appeal, the Tenth Circuit found that since plaintiffs' counsel did not take advantage of the opportunity to convince the court of the propriety of the challenges for cause by asking further questions, it was not an abuse of discretion for the district court to deny the challenges. To the same effect is *United States* v. *Brown*, 644 F.2d 101 (2d Cir.1981), a criminal case. The defendant in *Brown* claimed that the district court should have sustained a challenge for cause to a potential juror who worked for another branch of the bank the defendant allegedly had robbed. Instead, the juror had to be removed by the use of a peremptory challenge. Upon appeal, the court held that since defense counsel was given the opportunity at trial to prove the contention that the prospective juror possessed actual bias and that opportunity was not pursued, the district court did not commit error by not finding such bias.

Since we find there was no abuse of discretion in the court's decision not to grant appellants' challenge of Dr. Wang for cause, we need not go into the question of whether prejudice resulting from an abuse of discretion has been shown.

III. *Opening Statement*

[2] Appellants claim that appellees' prejudicial arguments during opening statement effectively denied them a fair trial.[3] We are not persuaded. "To justify a reversal based on improper comments of counsel, the conduct must be such as to gravely impair the calm and dispassionate consideration of the case by the jury." *Dixon* v. *International Harvester Co.*, 754 F.2d 573, 585

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[3] Appellants allege that appellees' statements that "plaintiffs' assertion of gross negligence are pure nonsense" and that their "real motivation" was "simple greed" were improper appeals to prejudice and passion. They also claim that the comments concerning the jury as the final arbiter of what was fair were far beyond the proper scope of an opening statement.

(5th Cir.1985). The alleged offending remarks were made at the commencement of a three week trial which included the testimony of numerous live witnesses and the introduction of a large number of depositions and exhibits. It is highly unlikely that a few somewhat exaggerated statements by appellees' counsel in his opening presentation so impermissibly tainted the jury's verdict as to require a new trial.

Additionally, the district court clearly instructed the jury at the beginning of opening statement:

> On the other side, there is this statement that you should always keep in mind, and that is, what the attorneys say in opening statement and, lastly, in argument to you, when all the evidence is in, that what the attorneys say is not evidence. This is clearly so, because the attorneys will speak much, but they are not going to say a single word as a witness under oath, sitting in the witness box. And it is from there that the evidence comes. So what the attorneys say is not evidence. And you will keep that in mind.

The court repeated its warning after all the parties had made their opening statements:

> A brief comment before we conclude. . . . . I told you, and I will again remind you that the factual assertions that the attorneys have made in their opening statements is not evidence. . . . And secondly, the lawyers have recited what they think the Court is going to instruct you. They may and then again they may not be correct in that regard.

These cautionary instructions specifically address and effectively defuse possible prejudice that might have arisen assuming appellees' comments during opening statement went beyond proper bounds.

We have held that objectionable comments should be considered "within the context of the court's rulings on objections, the jury charge, and any corrective measures applied by the trial court. Alleged improprieties may well be cured by an admonition

or charge to the jury." *Westbrook* v. *General Tire and Rubber Co.*, 754 F.2d 1233, 1238 (5th Cir.1985) (closing argument challenged for impropriety.) In veiwing the opening statement as a whole, we find that the effect of appellees' allegedly improper statements, although somewhat more extreme than is the norm, was not prejudicial, especially in light of the court's cautionary instructions.

IV. *Exclusion of Expert Witness*

[3] Appellants' final contention is that the district court abused its discretion by excluding the testimony of Barry Castleman, one of appellants' expert witnesses. The exclusion, however, was the result of Castleman's deliberate refusal to produce certain discovery material which the court deemed relevant to appellees' case.[4] "Control of discovery is committed to the sound discretion of the trial court and its discovery rulings will be reversed only where they are arbitrary or clearly unreasonable." *Mayo* v. *Tri-Bell Industries, Inc.*, 787 F.2d 1007, 1012 (5th Cir.1986). We do not find any abuse of discretion.

The issue arose when appellees served Castleman with a subpoena *duces tecum* to produce certain documents at his

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[4] The court ordered Castleman to produce the following items before he would be allowed to testify:

1. Copies of any articles, pamphlets, parts of books or books written by you or to which you contributed, which are related to your expected testimony, whether actually published or not, and a list of all such documents.

2. Copies of any written correspondence which you have sent to or received from any organization that represents any concern in the asbestos litigation, whether a defendant plaintiff or litigation group.

3. Copies of any written correspondence which you have sent to or received from any governmental agency regarding asbestos, asbestos-related disease, the current defendants or any former defendants of these lawsuits, or relating to regulation of any industry that utilizes asbestos-containing products.

deposition on April 9, 1985 in Houston.[5] Castleman stated at the deposition that he would not produce the documents because he did not feel that the discovery order was appropriate. Castleman testified that the production of written correspondence between him and any asbestos litigation defendants, plaintiffs, litigation groups, or governmental agencies would threaten his ability to earn a living and would potentially jeopardize confidential relationships. There was no justification, however, for Castleman's refusal to comply with the court's order since the documents might have contained relevant information that Castleman was a paid "expert" witness in a number of asbestos cases and the amount of money he had earned through such testimony.

After Castleman's refusal, appellees moved for sanctions, and the district court ordered that Castleman not be permitted to testify until he complied with the discovery request. The exclusion was conditional, and Castleman was given every opportunity to produce the necessary documents. It is well established that "the district court has discretion to impose appropriate sanctions against noncompliance with discovery requests." *Carson* v. *Polley*, 689 F.2d 562, 586 (5th Cir.1982). This sanction was appropriate. Further, no showing is made that Castleman was the only expert who could testify in support of appellants. Appellants were not deprived of their case by the exclusion of a single recalcitrant witness.

CONCLUSION

The district court did not abuse its discretion in deciding the three procedural issues now before this Court. The judgment of the district court is

AFFIRMED.

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[5] Appellees had attempted to depose Castleman on March 20, 1985 in Washington, D.C., but he failed to appear.

APPENDIX B

Parents, Subsidiaries and Affiliates of Defendants

I. *Armstrong is the parent corporation for:*
   1. Armstar;
   2. Forms & Surfaces, Inc.;
   3. Armstrong-Nylex (PPY.) Ltd.;
   4. Inarco, Limited;
   5. Arm-star Venture Assoc.

II. *Eagle-Picher is the parent corporation of:*
   Diehl & Eagle-Picher GMBH.

III. *Fibreboard Corporation is a wholly-owned subsidiary of:*
   Louisiana-Pacific.

IV. *Owens-Illinois, Inc. partially owns or is affiliated with:*
   1. Cristaleria Ecuador;
   2. Electro-Plasma;
   3. Kimble-Terumo;
   4. O-I/Schott Process Systems;
   5. Owens-Illinois Puertor;
   6. Teleglas;
   7. Vifloca;
   8. Cajas Corrugadas de Mexico, S.A.;
   9. Cagas Y Emtagues de Occidente, S.A.;
   10. Companhia Industrial Sao Paulo E Rio;
   11. Colsol Limited;
   12. Cristal Owens Plasticas Ltd.;
   13. Cristaleria Del Ecuador, S.A.;
   14. Durobor, S.A.;
   15. Emballages Laurent, S.A.;
   16. Envases De Borosillcato, S.A.;
   17. Fabrica de Vidrio Los Andes, C.A.;
   18. Gerresheim Glas A.G.;
   19. Hankuk Electric Glass Co., Ltd.;
   20. Hellenic-Owens Elefsis Glass Co., S.A.
   21. Hygienic-Lily, Ltd.;
   22. Johnson Radley (U.G.);

23. Kraft, S.A.
24. Manufacturera De Vidrios Planos, C.A.;
25. Middle East Glass Manufacturing Company;
26. Nippon Electric Glass Co., Ltd.;
27. Owens-Illinois De Puerto Rico;
28. T. T. Igar Jaya;
29. P. T. Kangar Consolidated Industries;
30. Papeteries D'Espaly S.A.R.L.;
31. Papeteries Etienne, S.A.;
32. Sasaki-Owens Co., Ltd.;
33. Sun-Lily Co., Ltd.;
34. Union Glass & Container Corp.;
35. Vina Santa Rita, Ltda.

V. *Owens Corning Fiberglas Corporation partially owns or is affiliated with:*

1. Australian Fibre Glass;
2. Bayer Owens Corning;
3. Fiberglas Canada;
4. Fiberglass Iran;
5. Home Capital Funds;
6. New Zealand Fibre;
7. Van Gelder Owens-Corn(ing);
8. Veroc Technology;
9. Asahi Fiber Glass;
10. Amiantit Fiberglass Industries, Ltd.;
11. Fiberglas Colombia, F.A.;
12. Polyplaster, S.A.;
13. Scandinavian Glasfiber A/B;
14. Veroc Technology A/S;
15. Vitro-Fibras, S.A.